RARY
COURT, U. S.

No. 97

Supreme Court, U.S.
FILED
MAY 1 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

THE BALTIMORE & OHIO RAILROAD COMPANY, CANTON RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, READING COMPANY, AND WESTERN MARYLAND RAILWAY COMPANY,

Appellants,

v.

BOSTON AND MAINE RAILROAD, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

JERVIS LANGDON, JR.,
301 Baltimore and Ohio Bldg.,
Baltimore 1, Md.,
Attorney for Appellant Railroads.

Of Counsel:
RICHARD R. BONGARTZ,
ROBERT B. CLAYTOR,
JOHN W. HANIFIN,
JOHN HENRY LEWIN,
WILLIAM C. PURNELL,
WILLIAM P. QUINN.

May 1, 1962.

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT	3
THE QUESTIONS ARE SUBSTANTIAL	9
(a) The "rational basis" for the Commission's decision under section 3(1) is clear	9
(b) Instead of being "too narrow," the Commission's interpretation and application of section 3(1) were eminently correct	12
(c) Aside from section 3(1), there was a rational and lawful basis for the Commission's decision	14
(d) The District Court erred in making an independent finding of reasonableness when the Commission had concluded that the appellant railroads had failed to sustain their burden of proving the proposed rates to be compensatory	16
CONCLUSION	18
APPENDIX A	19
APPENDIX B	31
APPENDIX C	33

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. ------

THE BALTIMORE & OHIO RAILROAD COMPANY, CANTON RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, READING COMPANY, AND WESTERN MARYLAND RAILWAY COMPANY,

Appellants,

v.

BOSTON AND MAINE RAILROAD, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the District of Massachusetts has not been officially reported and is attached hereto as Appendix A. The final judgment of the District Court, dated February 23, 1962, is attached hereto as Appendix B. The reports of the Interstate Commerce Commission, dated December 5, 1960, and June 15, 1961, are printed as *Equalization of Rates at North Atlantic Ports*, 311 I.C.C. 689 and 314 I.C.C. 185, respectively. The

order of the Interstate Commerce Commission, dated December 5, 1960, is unreported. The Commission's reports and order have been presented as a separate appendix for the convenience of the Court in this and related appeals.

JURISDICTION

This action was brought under 28 U.S.C. § 1336 to set aside and enjoin an order of the Interstate Commerce Commission. The judgment of the District Court enjoining the order of the Commission was entered on February 23, 1962, and these appellants filed their notice of appeal in that court on March 30, 1962. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by 28 U.S.C. 1253 and 2101 (b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Virginian Railway v. United States*, 272 U.S. 658; *Rochester Tel. Corp. v. United States*, 307 U.S. 125.

STATUTES INVOLVED

The statutory provisions involved, the National Transportation Policy (49 U.S.C. preceding §§ 1, 301, 901, 1001) and Sections 1(5), 3(1), 4(1), 15(1), 15(7), and 15a(2) (49 U.S.C. §§ 1(5), 3(1), 4(1), 15(1), 15(7), and 15a(2) of the Interstate Commerce Act, as amended, are set forth in Appendix C hereto.

QUESTIONS PRESENTED

The District Court set aside an order of the Interstate Commerce Commission which directed the cancellation of reduced rates proposed by railroads serving the ports of New York, Boston, Albany and Portland (the northern tier ports) on export and import traffic moving between those

ports and a defined interior territory. The purpose of the rate reductions was to eliminate long established rate differentials favoring Philadelphia, Baltimore and Hampton Roads (the southern tier ports) on such traffic. The questions presented are:

1. Did the District Court err in holding that there was no rational basis for the Commission's decision rejecting equalizing rates to and from northern tier ports when the Commission found that (1) such rates would cause "undue diversion" of traffic to the already dominant port of New York by eliminating the one competitive advantage of the southern tier ports, (2) lower rates to the southern tier ports were justified by "geographical transportation, and cost advantages," and (3) if the equalizing rates were allowed, matching reductions proposed by the appellant railroads serving the southern tier ports would have to be approved, thus restoring the same rate differentials at a lower level?

2. Did the District Court err in holding that the Commission, in deciding the relationship issue, construed section 3(1) "too narrowly"?

3. Was the District Court justified in making its own evaluation of the evidence and finding that the proposed rates to and from the northern tier ports had been shown by the appellee railroads to be just and reasonable, when the Commission made no such finding, and there was a finding by the Commission, based on a careful analysis of conflicting testimony, that appellees had not met the burden of proving the proposed rates to be compensatory?

STATEMENT

Eighty-five years ago the railroads serving the principal North Atlantic ports agreed upon a basis for relating the

rates that would apply to import-export traffic moving between these ports and the territory generally bounded by the Great Lakes on the north, a line extending between Buffalo, N.Y., and Pittsburgh, Pa., on the east, the Ohio River on the south, and the Mississippi River on the west. This agreement became known as the North Atlantic Ports Differential Agreement and provided that the rates to and from Baltimore should be 3 cents, and Philadelphia 2 cents, less than New York, and that Boston should have the same rates as New York. Later, Hampton Roads was accorded the same rates as Baltimore to and from the territory west of the so-called Sandusky, Ohio, line. The Baltimore rates also apply to imports through Portland, Maine, which move to differential territory over the lines of Canadian railroads; in other respects, the Portland rates are on the same level as New York. The Philadelphia rates have been made applicable to Albany, N.Y. *Albany Port District Comm. v. Ahnapee & W. Ry. Co.*, 219 I.C.C. 151 (1936).

Since 1877, the rate adjustment resulting from this agreement has been attacked by various interests, but the Commission, as pointed out in its decision herein, has "consistently upheld it as lawful."[1] It was founded upon the principle of "competitive opportunity," and this has been "the norm used in testing the soundness of the differentials from their inception."[2] Under the adjustment New York has become and remains the self-styled "world's greatest port," with heavy emphasis upon general cargo traffic.[3] The unchallenged finding of the Commission is that (311 I.C.C. at 711; App. 31):

[1] 311 I.C.C. at 696; App. 10-11.

[2] 311 I.C.C. at 695; App. 10.

[3] Exhibit 51, MLM-4. The record contains a communication from the Chairman of the New York Port Authority under the heading "General Cargo Is Vital" to the following effect (Exhibit 101, p. 4):

In evaluating the New York-New Jersey Port's position in the handling of ocean borne commerce it is essential to separate the

> The complete dominance by New York of the North Atlantic general-cargo traffic to and from the affected territory is clear. Of imports, its volume exceeded that of all the other ports combined, was more than double that of Baltimore, and almost four times that of Hampton Roads. As to general-cargo exports, New York's volume was 62.7 percent of the total volume for all of the ports and over 50 percent greater than that of the southern tier ports combined. Also, it was more than double the Baltimore volume and more than 10 times that of Hampton Roads.

Under the same adjustment the outports of Philadelphia, Baltimore and Hampton Roads have developed as bulk cargo ports because, as found by the Commission (311 I.C.C. at 737; App. 64).

> As bulk commodities, because of their low value, are peculiarly sensitive to transportation cost, the differential has greater influence on their movement than on general cargo.

In fact, as early as 1898 the Commission observed:

> It seems to be true that New York is in a measure losing its export grain business.
>
> * * * * * *
>
> In case of grain the freight rate is a very large factor in its value, while in case of other exports it may be

---

aggregate volumes into two main categories: general cargo and bulk cargo.

General cargo, which consists of relatively "high-value" commodities, is the foundation of the Port's economy. It provides the New York-New Jersey Port with most of the 430,000 jobs directly dependent on port commerce. It generates employment in such varied fields as marine transportation, foreign banking, export and import trading, freight forwarding, land transportation of trade goods and processing of agricultural imports. Bulk cargo, on the other hand, produces much less port income than does general cargo. Bulk cargo is generally handled through mechanically operated facilities, which require less labor than general cargo, and provides less "white-collar" employment in processing and documentation.

> insignificant. A differential which determines the route by which grain shall be exported would have no effect whatever upon some other article. These higher grade exports go almost entirely to the port of New York, from which they find quicker service to all parts of the world, and from which they can only find communication with many parts of the world. * * * So it is by no means certain that more grain ought not to go through the outports to offset the increased exports of other kinds from New York.[4]

From the foregoing it is not to be concluded that New York is exclusively a general cargo port. On the contrary in 1955 the port of New York "handled more tonnage of all commodities than any of the southern tier ports; excluding petroleum, coal and iron ore, it handled nearly as much as those ports combined; and it handled about 60% more general cargo exports and imports than those ports combined" (311 I.C.C. at 706; App. 23).

The present controversy is "the first instance in which any port railroads have proposed to alter the adjustment."[5]

In 1956 certain railroads (respondents before the Commission and appellees in this Court) serving the so-called northern tier ports of New York and Boston (as well as Albany, N.Y., and Portland, Me.) filed rates on export and import traffic on the lower Baltimore level. They sought to bring about an equalization of rates at North Atlantic Ports, from Hampton Roads on the south to Portland, Me., on the north, both on general cargo and the bulk commodities here involved (which do not include export coal and import iron ore). At the same time, the railroads[6]

[4] *New York Produce Exchange v. Baltimore & O. R. Co.*, 7 I.C.C. 612 (1898).

[5] 311 I.C.C. at 696; App. 10.

[6] Including the Baltimore & Ohio R. Co., and Pennsylvania Railroad Co., which also serve the port of New York.

serving the southern tier ports of Philadelphia, Baltimore and Hampton Roads (protestants before the Commission and appellants in this Court) filed a counter-proposal "in the event that the respondents' [appellees'] proposed rates were found lawful" that "would restore the present differentials, thus maintaining the long standing port relationships, but upon a lower level of rates."[7] Upon numerous protests, both rate schedules were suspended, and the Commission entered upon an investigation of their lawfulness under the provisions of section 15(7) of the Interstate Commerce Act.

In its principal decision of December 5, 1960, the Commission, with Commissioners Freas and McPherson concurring in the result, and with Commissioner Webb filing the only dissent, found that the proposed lower rates from the northern tier ports would be unlawful because they were "not shown to be reasonably related" to the southern tier port rates and "would result in undue preference of and advantage to the northern tier ports as a group and in undue prejudice and disadvantage to the southern tier ports" in violation of section 3(1) of the Interstate Commerce Act (311 I.C.C. at 741-2; App. 71).

Underlying this ultimate finding of unlawfulness were supporting findings to the effect that the port of New York, with "complete dominance" in the movement of general cargo, should not be permitted to complete its monopoly by removing the one competitive advantage of differential rates at the southern tier ports. For these were the rates that had been responsible for developing the bulk commodity ports, and without them, there would be nothing. In any event, said the Commission, if lower rates are permitted to go into effect from northern tier ports, "alternate approval" of the proposed lower rates to and from the southern tier ports would be required because—

[7] 311 I.C.C. at 690; App. 3.

> The greater distance of the northern tier ports from the affected territory, and the higher costs of service to and from those ports, are firmly established."[8]

Action to set aside the Commission's decision was then brought in the United States District Court for the District of Massachusetts by the appellee railroads, together with port and commercial interests at New York and Boston, and in its answer to the complaint, the United States, as set forth in the opinion of the lower court, admitted that the Commission's order was erroneous "in that it treated the proposal vis-a-vis the northern tier ports as a group and failed to consider the lawfulness of the proposed rates as to each port separately." (*post*, p. 23). Accordingly, while the lower court held the proceedings in abeyance, the Commission, by order dated April 11, 1961, "reopened the proceedings for reconsideration, on the record as made, of the lawfulness of the proposed rates separately and independently on traffic to and from each of the northern tier ports."[9]

Again the Commission rejected the proposed rates.[10]

While in this further consideration by the Commission the issue concerned rates to and from each of the northern tier ports separately, the real question was whether, irrespective of the treatment of New York, Boston was entitled to rates on the lower Baltimore level. The Commission said no for two reasons: first, Boston's much greater distances could "not be ignored" "under the circumstances

[8] 314 I.C.C. at 741; App. 70. In the same decision the Commission set aside the counter proposal of the appellant railroads serving the southern tier ports which, as noted by the District Court, "was to take effect only if the plaintiffs' (appellees' here) schedules were allowed." (*post*, p. 22). The Commission determined that "In view of our conclusions herein, the evidence presented in support of the counter proposal need not be considered" (314 I.C.C. at 700; App. 46).

[9] 314 I.C.C. at 180; App. 85.

[10] 314 I.C.C. at 199; App. 102-103.

here revealed" including the "geographical, transportation, and cost advantages" of the southern tier ports (314 I.C.C. at 198; App. 102), and second, lower rates to and from Boston than to either New York or Albany, N.Y., as intermediate points "would be in violation of the long-and-short-haul provisions of section 4 of the Interstate Commerce Act" (314 I.C.C. at 197; App. 100).

With the release of this further decision, the proceedings before the District Court were resumed and there followed its decision of February 16, 1962, from which this appeal is taken (*post*, pp. 19-31). The District Court concluded "that the Commission's decision is erroneous in law and lacks the rational basis necessary to uphold it and it must be set aside." (*post*, pp. 30-31).

THE QUESTIONS ARE SUBSTANTIAL

The primary question is whether the District Court was right in concluding—

> that the Commission's decision is erroneous in law and lacks the rational basis necessary to uphold it
> * * *.

This conclusion on the part of the District Court rests on a completely erroneous interpretation of the Commission's decision.

(a) *The "rational basis" for the Commission's decision under section 3(1) is clear.*

The Commission's decision against equalization rests, so far as section 3(1) is concerned, on two grounds, as follows:

First. Equalization would cause "undue diversion" of traffic to New York and thus permit "the world's greatest port," to increase its dominant position in the handling of

general cargo and to effect a monopoly through the removal of the one competitive advantage of the southern tier outports of Philadelphia, Baltimore, and Hampton Roads namely, differentially lower rates which are effective in attracting the movement of bulk commodities (311 I.C.C. at 722-741; App. 45-70).

Second. Equalized rates would be inconsistent with the much greater distances to the individual northern tier ports "under the circumstances here revealed." These "circumstances" include "the higher costs of service to and from those [northern tier] ports" which the Commission found to be "firmly established" and the "geographical, transportation, and cost advantages" of the southern tier ports and the railroads serving them which the Commission also described as "fully substantiated of record." (311 I.C.C. at 741; App. 70; 314 I.C.C. at 198; App. 102).

In rejecting equalization for the northern tier ports as a group the Commission relies on the first reason, (311 I.C.C. 689; App. 1) and in reaching the same conclusion for the individual northern ports the Commission adds the second reason (314 I.C.C. 185; App. 84).

Contrast the decision of the District Court. It asserts that—

> The Commission in reaching the conclusion that the proposed rates violate Section 3(1) relies on a single subsidiary finding — the distance disadvantage of the northern tier ports. (*post*, p. 28).

The District Court is in error.

In the first place, the Commission did not rely "on a single subsidiary finding" of the distance disadvantage of the northern tier ports. As has been pointed out, its primary reason for finding a section 3(1) violation was

to preserve the one and only competitive advantage of the outports of Philadelphia, Baltimore, and Hampton Roads and thus to prevent a further erosion of traffic to "the world's greatest port" of New York.

In the second place, to the extent that the Commission took distance into account, it did so only "under the circumstances here revealed" including "the higher costs of service" to and from the longer-haul northern tier ports and the "geographical, transportation, and cost advantages" of the shorter-haul southern tier ports (311 I.C.C. at 735, 741; App. 62, 70; 314 I.C.C. at 198; App. 102). Use of distance in these "circumstances" even the District Court would have to approve, for it pointed out (with obvious disregard of the implications here) in its opinion:

> Distance differences might be relevant insofar as they reflect differences in the cost and value of the services of plaintiff and defendant railroads, see *United States v. Illinois Cent. R.R.*, 263 U.S. 515, 524 (1924), but the Commission made no such cost or value findings nor does the record contain evidence from which it could make such findings. We must, therefore, rule that its conclusion lacks the required basic findings to support it. (*post*, p. 30).

To say, as the District Court does, that the Commission "made no such cost or value findings nor does the record contain evidence from which it could make such findings" only proves that the court read neither the Commission's decision with care nor the record before the Commission. There was voluminous evidence on these points, and the Commission, as pointed out above, went out of its way to characterize the differences in cost as "firmly established" and "fully substantiated of record" (311 I.C.C. at 741; App. 70; 314 I.C.C. at 198; App. 102). Moreover, its report is filled with findings as to the greater value of the services through the port of New York. So valuable are these

services that New York advertises itself as the cheapest port to use despite higher freight rates. (311 I.C.C. at 719; App. 42).

Thus in holding that there was no "rational basis" for the Commission's decision, the District Court only exhibits a complete lack of understanding as to what the basis was. The soundness of the basis actually used by the Commission is beyond question.

(b) *Instead of being "too narrow," the Commission's interpretation and application of section 3(1) were eminently correct.*

The District Court gives another reason for upsetting the Commission's finding of a section 3(1) violation. It concludes that the Commission's decision "rests solely on the proposition that some ports would be unduly preferred and others unduly prejudiced by the proposed rates" and

> We find that the Commission erred in applying Section 3(1) too narrowly and in not giving due weight to the interests of shippers, receivers, carriers, and inland localities. (*post*, p. 28).

The District Court thus implies that "the interests of shippers, receivers, carriers, and inland localities" would only be served by equalization, and that the Commission ignored them. The District Court says further:

> There was, furthermore, extensive evidence from shippers, both private and representatives of various agencies of the United States, that the differential adjustment is a controlling consideration in their choice of ports. These witnesses supported equalization and testified to the need to provide relief from congested ports, bunching and inefficient utilization of cars and delays in the flow of traffic. (*post*, pp. 25-26).

All of this evidence was carefully weighed in the Commission's report. The District Court cites it as supporting

equalization. But the Commission, with greater insight, realized that the cancellation of the differentials would remove the one reason these shippers have for using the outports and thus cause an "undue diversion" of traffic to the already dominant port of New York (311 I.C.C. at 741; App. 70).

The Commission went further. It also weighed the shipper testimony on the other side, including the "shipper evidence presented by the protestants." It is this evidence that shows the overwhelming shipper preference for New York despite higher rates — a fact that is confirmed by commercial interests in New England which insist upon using the port of New York even though their rates through Boston are lower (311 I.C.C. at 725, 737; App. 49, 65).

The wholly superficial character of the District Court's opinion is exemplified by that portion of the above-quoted finding reading—

> These witnesses [supporting the northern tier ports] * * * testified to the need to provide relief from congested ports, bunching and inefficient utilization of cars and delays in the flow of traffic. (*post*, p. 26).

The District Court does not mention that, according to the Commission, "there is no evidence that such situations have obtained or are now present at the southern tier ports" (311 I.C.C. at 736; App. 64).

Instead of applying section 3(1) "too narrowly" and failing to give "due weight to the interests of shippers, receivers, carriers, and inland localities," the Commission went out of its way to take these interests, usually in sharp conflict, into account. The difference between the Commission's treatment and that of the District Court is that the Commission considered the evidence on both sides and analyzed it with perception — as would be expected from a body expert in this field.

(c) *Aside from Section 3(1), there was a rational and lawful basis for the Commission's decision.*

In upsetting the Commission's decision, the District Court holds that the Commission's finding to the effect that, "equalization is not necessary to enable that port [of New York] to compete" is beside the point. The District Court says that "the primary issue is whether equalization is necessary to enable the plaintiff [appellant] railroads to compete."[11]

The dispositive answer here — an answer that the District Court does not even discuss — is found in the Commission's decision where it is pointed out (311 I.C.C. at 741; App. 70):

> As hereinbefore mentioned, protestant railroads have filed a counter proposal, in the event that the respondents' rates are found lawful; they propose to reduce their rates between southern tier ports and the same interior territory by the same amounts as proposed by the respondents. The greater distance of the northern tier ports from the affected territory, and the higher costs of service to and from those ports, are firmly established. Thus, approval of respondents' proposed rates would require alternate approval of protestants' proposed rates.

---

[11] The District Court elaborates on this point by saying (*post*, pp. 29-30):

> * * * the Commission has failed to distinguish between rates which carriers may voluntarily publish to meet competition pursuant to section 15(7) and rates which carriers, on complaint under section 3(1) may be required to change. It is now well established that carriers may, within the zone of reasonableness, adjust rates to meet competition — (citations) — in which case the issue to be decided is whether the proposed rates are lawful. In a complaint proceeding the question is whether the *existing* rates are lawful and, if not, whether they should be required to be changed. However, both the Report and the Report on Reconsideration give continuous indication that the Commission regarded this as a "port" case, not a "railroad" case.

The District Court does not even suggest that carriers serving the southern tier ports have any less managerial discretion to meet competition than do the carriers serving the northern tier ports. That being so, the Commission was obviously sound in preserving the differential adjustment at the higher level (by rejecting the equalizing rates of the northern tier carriers). Otherwise, as held by the Commission, there would be "a needless dissipation of carrier revenues." (311 I.C.C. at 741; App. 70). As set forth in its decision (311 I.C.C. at 741; App. 70):

> We have been given the power to fix rates, among other reasons, for the purpose of preventing destructive competition and promoting the financial stability of the regulated carriers. Failure to observe our obligations in the exercise of that power would find us remiss in our duties.

There is no finding to the contrary by the District Court.

Finally, in taking issue with the Commission's finding that "equalization would not materially affect the flow of traffic" to the ports of Boston, Albany, and Portland, the District Court held that such findings contradict the Commission's ultimate conclusion of undue prejudice to the southern tire ports and ignored appellees' right to attempt to gain some of this traffic for their lines. But in so holding, the Court ignored the reality, as found by the Commission, that with rates equal to those of New York (and with an even lower rate at Albany) the northern tier ports are subservient to New York. To the extent that these ports have been able to gain traffic at the expense of New York, other factors than freight rates have controlled — all of which leads to the ultimate conclusion which the District Court criticised out of context.

(d) *The District Court erred in making an independent finding of reasonableness when the Commission had concluded that the appellant railroads had failed to sustain their burden of proving the proposed rates to be compensatory.*

Since the Commission rejected the rates proposed by the carriers serving the northern tier ports because of undue preference and prejudice under section 3(1), an ultimate finding as to whether the proposed rates would be just and reasonable was unnecessary, and the Commission made none. The Commission did find however that the appellant railroads had not sustained the burden of proving that the proposed rates would be compensatory, and the District Court held that "it [the Commission] refused to find the rates compensatory." (*post*, p. 26).

But the District Court, in setting aside the Commission's order, went further than to reverse the Commission's findings under section 3(1). Preempting the administrative function, the Court made its own evaluation of the evidence and its own finding of reasonableness.

And what evidence does the District Court cite in support of its finding of reasonableness? It referred to two contentions advanced before the Commission by the appellee railroads, and a subsidiary finding by that body (*post*, p. 26):

(a) The proposed reductions are for "minimal" amounts.

(b) The average rate per ton and per ton mile under the proposed rates would exceed the average for freight traffic in the United States.

(c) The Commission found, as to part of the traffic, that "the revenue from the proposed rates would equal or exceed by a very small margin the estimated out-of-pocket costs." (311 I.C.C. at 734; App. 61).

Certainly, evidence on these three points falls far short of establishing reasonableness.

The fact that proposed rates reflect only minimal reductions is no proof that they would be compensatory. There is no cost evidence in the record that even the present rates to and from the northern tier ports (before the proposed reductions) are compensatory. In fact, there is much evidence to the contrary.

The further fact that revenues under the proposed rates would exceed average revenues in the United States is not connected up with the services performed and therefore has no meaning. If the District Court had examined the record, it would have found that distances between the northern tier ports and differential territory are much longer than those for average traffic in the United States, and accordingly, the revenues *should* be greater (Record before I.C.C. at 1823-5). Moreover, traffic to and from the port of New York incurs extraordinary terminal expenses (see the table 311 I.C.C. at 735; App. 62) that bear no relation to average figures for the United States.

Finally, the Commission's finding "that the revenue from the proposed rates would equal or exceed by a very small margin the estimated out-of-pocket costs" is not a conclusion that the proposed rates would be compensatory. On the contrary, to be compensatory, rates must produce "a contribution to the transportation burden * * * recognizable contribution to the constant costs." *Animal or Poultry Feed, Hebron, N. Dak., to Twin Cities*, 314 I.C.C. 181, 184 (1961). Here, there is no evidence of such con-

tribution, and the Commission added (311 I.C.C. at 734; App. 61).

> a presentation of costs adequate to determine whether the proposed rates would be reasonably compensatory should embrace all types of traffic which those rates are expected to attract, and should reflect the costs of the specific methods by which they would be handled. It may be that other traffic would be forced to absorb a larger portion of the constant costs in order to maintain a national transportation system conforming to the ultimate objectives of the national transportation policy.

Even if the proposed rates had been found to be compensatory, this would not have been conclusive as to their reasonableness. In presuming to pass on this question, there were other factors that the District Court should have taken into account.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial. It is therefore respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

JERVIS LANGDON, JR.,
301 Baltimore and Ohio Bldg.,
Baltimore 1, Md.,
Attorney for Appellant Railroads.

Of Counsel:
RICHARD R. BONGARTZ,
ROBERT B. CLAYTOR,
JOHN W. HANIFIN,
JOHN HENRY LEWIN,
WILLIAM C. PURNELL,
WILLIAM P. QUINN.

May 1, 1962.

APPENDIX A

United States District Court
District of Massachusetts

Civil Action No. 61-38-S

Boston and Maine Railroad and The New York, New Haven and Hartford Railroad Company,
Plaintiffs,

v.

United States of America and Interstate Commerce Commission,
Defendants.

Before WOODBURY, Chief Judge, United States Court of Appeals, SWEENEY, Chief Judge, United States District Court, and FORD, United States District Judge.

OPINION OF THE COURT

February 16, 1962

SWEENEY, CH. J. The plaintiffs — Boston and Maine Railroad and The New York, New Haven and Hartford Railroad Company — brought this action pursuant to 28 U.S.C. §§ 1336, 2284, 2321 and 2325, to set aside and enjoin enforcement of an order of the Interstate Commerce Commission, Investigation and Suspension Docket No. 6615, Equalization of Rates at North Atlantic Ports, 311 I.C.C. 689, denying a fourth-section application and cancelling new rate schedules filed by the plaintiffs and their connecting carriers,[1] in which they proposed to reduce rates

[1] The Delaware and Hudson Railroad Corporation, Erie-Lackawanna Railroad Company, Grand Trunk Railway System-Lines East, The New York Central Railroad Company, New York, Susquehanna and Western Railroad Company.

on export and import traffic[2] between the ports of New York and Albany, New York, Boston, Massachusetts, and Portland, Maine, hereinafter referred to as northern tier ports, on one hand, and affected territory[3] on the other. The proposal was designed to place on a parity the rates on this traffic through these ports with rates on like traffic through the southern tier ports.

The original defendants are the United States and the I.C.C. Other railroads and various port and commercial interests have intervened on both sides.[4]

---

[2] Except iron ore, coal, and coke which is a direct product of coal.

[3] It includes territory on and west of a line extending from a point just west of Buffalo through Warren, Oil City, Butler, Pittsburgh, and Washington, Pa., Wheeling, W. Va., thence along the east bank of the Ohio River to Kenova, W. Va., including points in West Virginia, Charleston and west thereof, certain points in Kentucky on the lines of The Chesapeake and Ohio Railway Company, and points on the south bank of the Ohio River from Huntington, W. Va., to Cincinnati, Ohio.

[4] The intervening plaintiffs include the Massachusetts Port Authority; the Port of New York Authority; the State of New York; the City of New York; Brooklyn Chamber of Commerce, Inc.; Belleville Manufacturers' Association; Bergen County Chamber of Commerce; Bronx Board of Trade; Chamber of Commerce, Garfield, N. J.; Chamber of Commerce, Irvington, N. J.; Chamber of Commerce of Eastern Union County; Clifton Chamber of Commerce; Commerce and Industry Association of New York, Inc.; Hoboken Chamber of Commerce; Ironbound Manufacturers' Association, Inc.; The Maritime Association of the Port of New York; Newark Association of Commerce and Industry; New Jersey Industrial Traffic League, Inc.; Queensborough Chamber of Commerce; The Shippers Conference of Greater New York; The West New York Chamber of Commerce; West Side Association of Commerce in the City of New York; and the railroads listed in paragraph one.

The intervening defendants include the Baltimore and Ohio Railroad Company; Canton Railroad Company; The Chesapeake and Ohio Railway Company; Norfolk and Western Railway Company; The Pennsylvania Railroad Company; Reading Company; Western Maryland Railway Company; the Delaware River Port Authority; the Virginia State Ports Authority; Norfolk Port and Industrial Authority; City of Philadelphia; Maryland Port Authority; Baltimore Association of Commerce; and the Maine Central Railroad Company.

The differences in existing rail rates on import and export traffic are shown below.

Port	*Differentials, in cents per 100 pounds*					
	Classes					
	1	*2*	*3*	*4*	*5*	*6*
Import traffic						
Canadian ports (same as Baltimore)						
Portland (Baltimore rates via Canadian routes; New York rates via standard routes)						
Boston (same as New York)						
Albany (Philadelphia rates, subject to domestic rates as maxima)						
Philadelphia under New York	6	6	2	2	2	2
Baltimore under New York	8	8	3	3	3	3
Hampton Roads[1] (same as Baltimore)						
Export traffic						
Canadian ports:						
Halifax, St. John, et cetera (same as New York)						
Montreal (same as Philadelphia)						
Portland						
Boston (same as New York)						
Albany (Philadelphia rates, subject to domestic rates as maxima)						
Philadelphia under New York: Grain, 0.5 cent under N.Y. Flour, 1 cent under N.Y.	2	2	2	2	2	2
Baltimore under New York: Grain, 1.5 cents under N.Y. Flour, 2 cents under N.Y.	3	3	3	3	3	3
Hampton Roads[2] (same as Baltimore)						

[1] To territory west of the Sandusky, Mansfield, Zanesville, Marietta line.

[2] From territory west of the Sandusky, Mansfield, Zanesville, Marietta line.

The differentials were the result of an agreement entered into by North Atlantic port railroads in 1877. At that time ocean rates to Philadelphia and Baltimore were higher than to the northern tier ports and the object of the agreement was "to avoid misunderstanding as to the geographical advantages or disadvantages of New York, Philadelphia, and Baltimore as affected by railroad-ocean transportation, and to effect an equalization of rail-ocean transportation cost between interior points and foreign ports reached through these cities." Boston rates, under this agreement, were to be no less than those to and from New York.

Beginning in the early 1920's and extending to about 1935, ocean rates to and from the different ports gradually were equalized and the total transportation charge through the northern tier ports consequently became higher than the combined cost of rail and ocean transportation through a southern tier port. It is this competitive disadvantage which the plaintiff railroads sought to remove with their proposed rate schedule.

By schedules filed to become effective simultaneously with those of plaintiffs, certain railroads which serve the southern tier ports and, in some instances, also New York, proposed to reduce their rates by the same amounts. This counterproposal which was to take effect only if the plaintiffs' schedules were allowed, would restore the differential at a lower level.

Upon protests of each group to the other proposal, the I.C.C. suspended both schedules and instituted an investigation into their lawfulness. After hearing and review by the Commission, it issued the order from which this appeal was taken, denying the fourth-section application and cancelling the plaintiffs' proposed schedule on the findings that the "proposed rates are not shown to be reasonably related to the present rates on like traffic between the same interior points and the southern tier ports"; that they "would result in undue preference of and advantage to the northern tier ports as a group and in undue preju-

dice and disadvantage to the southern tier ports," and that they "are not shown to be just and reasonable." Equalization of Rates, *supra*, at 741, 742.

In its answer to the complaint in this action the United States admitted that the Commission's order was erroneous in that it treated the proposal vis-a-vis the northern tier ports as a group and failed to consider the lawfulness of the proposed rates as to each port separately. As a result, the Commission reopened the proceedings "for reconsideration on the present record of the lawfulness of the proposed rates separately and independently on traffic to and from each northern tier port." The proceedings in this court were held in abeyance pending this decision.

On reconsideration the Commission affirmed its original holding and also found that the greater distance of the northern tier ports from affected territory over Baltimore and Philadelphia "may not be ignored without running counter to the provisions of section 3(1) of the Act," p. 21, Recon.[1] Moreover, it found "so far as New York is concerned, rate equalization is not required to enable that port to meet the competition of the southern tier ports, and that, so far as Boston, Portland, and Albany are concerned, such equalization would not materially affect the flow of foreign traffic through any of these ports," p. 21, Recon.

The Commission's decision is attacked here generally as being erroneous in law, unsupported by essential basic findings and unsupported by substantial evidence on the record as a whole.

The specific object of attack by the plaintiffs in this proceeding is the Commission's conclusion of a section 3(1) violation, and the weight the Commission attached to the sole subsidiary finding upon which this conclusion is based — that the northern tier ports have a distance disadvantage over Baltimore of from 223 miles in the case of Boston to 117 miles in the case of New York.

---

[1] Page references so designated are to the mimeographed copy of the Report of the Commission on Reconsideration.

It is admitted by the plaintiffs that the function of a court reviewing an administrative decision is a limited one. The general rule is that "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co. v. United States*, 292 U.S. 282, 286-7 (1934), and specifically "the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power or (3) based upon a mistake in law." *I.C.C. v. Union Pacific R.R.*, 222 U.S. 541, 547 (1911). Further, an order cannot be sustained unless supported by essential basic facts particularly stated. *Atchison, T. & S. F. Ry., v. United States*, 295 U.S. 193 (1935); *United States v. Chicago, M., St. P. & P. R.R.*, 294 U.S. 499 (1935).

Under 49 U.S.C. § 15(7), the plaintiffs had the burden of proof to show that the proposed rates are "just and reasonable" within the meaning of section 1(5), free from unjust discrimination prohibited by section 2 and that they contain no undue preference or prejudice proscribed by section 3(1).

The evidence before the Commission showed and the Commission found that the four northern tier ports experienced a relative decline in the participation of *total* United States foreign tonnage in the period 1923-55, while the relative share of the southern tier ports increased markedly during the same period. Thus, even while the foreign traffic through New York during this period rose from 22.6 million gross tons to 36.2 million gross tons, its share of the total United States tonnage declined from 28.6 per cent to 14 per cent. Boston's participation dropped similarly from 4.7 per cent to 2.5 per cent. On the other hand the share of the southern tier ports of total United States imports and exports increased as follows: Philadelphia from 7.9 to 15.7 per cent, Baltimore from 8.4 to 10.4 per cent and Hampton Roads from 4.3 to 17.1 per cent.

Since these figures are not limited to affected territory traffic, nor even to rail tonnage, they are by no means conclusive proof of the plaintiffs' position; but they do

serve as an indication of the trend in import-export traffic movement. In order to present a clearer and more complete picture of comparative traffic between all North Atlantic ports and affected territory the railroads conducted traffic studies during 1955-56 which showed that 75.8 per cent of imports and 63.7 per cent of exports (measured by carloads) moved through the southern tier ports. Similar, but incomplete studies for the years 1946 and 1947 tentatively indicate that a downward trend of import-export traffic to affected territory on the lines serving New York exists.

The Commission points out that New York still clearly dominates general cargo traffic and that the preponderance of southern tier traffic consists of bulk cargo[1] which prefers these ports because of their modern, specialized facilities and services. It is also apparent, however, that bulk cargo is necessarily more sensitive to rate differentials and the Commission implicitly so acknowledges by noting that the equalization of ex-lake rates on grain from Buffalo has resulted in a shift of the relative shares of that traffic in favor of the northern tier ports. Moreover, New York's dominance in general cargo traffic is not sufficient reason for denying it and the railroads serving it the opportunity to compete for bulk cargo traffic, as "both types of cargo are considered essential to a healthy port economy." Equalization of Rates, *supra*, at 701.

There was, furthermore, extensive evidence from shippers, both private and representatives of various agencies of the United States, that the differential adjustment is a controlling consideration in their choice of ports. These

[1] "Ocean borne commerce is classified into two types of cargo. By far the largest in volume is bulk cargo. It consists generally of low-value heavy volume raw materials which are handled at the port by mechanical facilities and provide bottom loading for ships or may move as full cargoes. The other type, called general cargo, includes principally manufactured and semimanufactured goods of relatively high value, which are usually packaged. General cargo generally constitutes the more profitable 'top loading' for ships in a balanced cargo operation." Equalization of Rates, *supra*, at 700.

witnesses supported equalization and testified to the need to provide relief from congested ports, bunching and inefficient utilization of cars and delays in the flow of traffic.

In addition to this evidence indicating the importance of the differential and showing the necessity for its removal, the plaintiffs presented proof that the proposed rates are just and reasonable. In view of the minimal amounts of the proposed reductions (reduction in revenue from Chicago to Boston would be .08 cents per ton-mile on first-class traffic and .10 cents on Column 13 traffic, for example), the plaintiffs relied on a prima facie showing of revenues. There was testimony that, using representative origins and destinations and the proposed rates, for 96.8 per cent of all tonnage moving through the port of New York, the import traffic averaged a rate per ton of $19.20 and revenues per ton-mile of 2.47 cents, and that for export traffic these figures were $18.00 and 2.32 cents. In comparison the average revenue per ton-mile for Class I railroads in the United States is 1.384 cents.

The defendant railroads countered this evidence by showing that with respect to traffic through the port of New York the proposed rates were insufficient to return out-of-pocket costs. But, while it refused to find the rates compensatory, the Commission did find after restating and adjusting the cost evidence, that "the revenue from the proposed rates would equal or exceed by a very small margin the estimated out-of-pocket costs." Equalization of Rates, *supra*, at 735.

On this evidence the plaintiffs certainly established prima facie that the proposed rate schedule is just and reasonable. We now turn to the Commission's disposition of the case. As noted above, it disallowed the proposal principally on the ground that the rates would violate section 3(1). This section provides that

> "It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advan-

> tage to any particular person, company, firm, corporation, association, locality, port, port district, gateway . . . or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway . . . or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . ."

In one of the earliest cases to come before the Supreme Court under this Act, the Court said that when presented with a question of unjust discrimination, the Commission is to "take into consideration all the facts of the given case — among which are to be considered the welfare and advantage of the common carrier, and of the great body of the citizens of the United States. . . . The Commission is not only to consider the wishes and interests of the shippers and merchants of large cities, but to consider also the desire and advantage of the carriers in securing special forms of traffic; and the interest of the public that the carriers should secure that traffic, rather than abandon it, or not attempt to secure it." *Texas & Pac. Ry. v. I.C.C.*, 162 U.S. 197, 218 (1896). In 1940, Congress, by adding the National Transportation Policy, 49 U.S.C., affirmed and reiterated the view that the Act must be interpreted as a whole and the competing interests of shippers, carriers, and localities carefully balanced "to the end of developing a national transportation system. . . ."

While apparently recognizing these principles, the Commission, in this case, nonetheless wholly ignored them. It noted the voluminous testimony of shippers and receivers in favor of equalization, but in its conclusions completely disregarded this evidence. It considered the need of the plaintiffs and their competitive disadvantage, but discounted both in its findings. Its final decision rests solely on the proposition that some ports would be unduly preferred and others unduly prejudiced by the proposed rates.

In emphasizing the welfare of ports and port districts, the Commission apparently relied on the 1935 amendment

to section 3(1) which added "ports, port districts, gateways and transit points," to the interests protected by that section.

In *Texas & Pac. Ry. v. United States*, 289 U.S. 627 (1933), the Supreme Court had held that the word "locality" referred to "points of origin or destination" and did not include gateways. The purpose of the amendment was only to restore to the Commission a power which it had previously exercised, but which the Supreme Court had held the Commission did not have. Neither the legislative history nor the plain words of the amendment indicate that any change in the prevailing rules respecting undue preference and prejudice or any special treatment of ports and port districts was intended.

We find that the Commission erred in applying section 3(1) too narrowly and in not giving due weight to the interests of shippers, receivers, carriers, and inland localities.

The Commission in reaching the conclusion that the proposed rates violate section 3(1) relies on a single subsidiary finding — the distance disadvantage of the northern tier ports. In the light of the history of the differential, earlier decisions of the Commission concerning it, the original report issued in this case, and the facts of this case, this finding in the Report on Reconsideration and its import are somewhat difficult to understand and, in view of the applicable law, erroneous. In the first place, the differential was established to place all North Atlantic ports on a parity with respect to the aggregate of rail and ocean charges. No consideration whatever was given to dispartity in rail distances then or later. On the contrary, when the Thurman-Cooley-Washburn Advisory Commission concluded in 1882 that the differentials should remain, it specifically rejected the "distance principle" as controlling port relationships and rested its award on the principle of "competitive opportunity."

Until it filed its Report on Reconsideration in this proceeding, the Commission, itself, has continually adhered

to the proposition that distance plays no part in the determination of port differentials. It so stated even in its original report: "Such distance disadvantages as they (the northern tier ports) have are much less than the substantial differences to and from some other ports which have a parity or near parity of rates, including the Canadian ports, and the wide differences which obtain where the several South Atlantic and Gulf ports are equalized. . . . It is apparent that considerable disregard of rail distances is characteristic of all port adjustments, as it was in the establishment of the rates here dealt with." Equalization of Rates, *supra*, at 715, 716.

Even while proclaiming this new rule, the Commission ignores it. Import rates from Portland may remain on a parity with Baltimore in spite of a distance disadvantage of more than 300 miles. Moreover, the present differentials do not in any way reflect the distance differences.

Secondly, one of the purposes of the 1935 amendment to section 3 was, as the Commission had previously pointed out, Equalization of Rates, *supra*, at 716 and cites therein, to permit all ports and the carriers serving them to compete for all import and export traffic and thereby maximizing the number of ports available. The finding in this case, if pressed to its logical conclusion, would result in traffic flowing only through the most distance favored port. On the other hand, if applied only in this case, the decision is arbitrary and capricious.

Thirdly, the Commission has failed to distinguish between rates which carriers may voluntarily publish to meet competition pursuant to section 15(7) and rates which carriers, on complaint under section 3(1) may be required to change. It is now well established that carriers may, within the zone of reasonableness, adjust rates to meet competion — *United States v. Chicago, M., St. P. & P. R.R.*, 294 U.S. 499, 506 (1935); *Texas & Pac. Ry. v. United States*, 289 U.S. 627, 636 (1933); *New York Cent. R.R. v. United States*, 99 F. Supp. 394 (D.C. Mass. 1951) — in which case the issue to be decided is whether the pro-

posed rates are lawful. In a complaint proceeding the question is whether the *existing* rates are lawful and, if not, whether they should be required to be changed. However, both the Report and the Report on Reconsideration give continuous indication that the Commission regarded this as a "port" case, not a "railroad" case. For example, the observation that "in the rare instances where rate changes in port relationships have been required by us, distance has been an important consideration," p. 21, Recon., while perhaps true, was totally irrelevant to the issues before it. Distance differences might be relevant insofar as they reflect differences in the cost and value of the services of plaintiff and defendant railroads, see *United States v. Illinois Cent. R.R.*, 263 U.S. 515, 524 (1924), but the Commission made no such cost or value findings nor does the record contain evidence from which it could make such findings. We must, therefore, rule that its conclusion lacks the required basic findings to support it.

The Commission disapproved the plaintiff's proposal on the additional ground that, insofar as New York is concerned, equalization is not necessary to enable that port to compete. This conclusion again is based on a misunderstanding of the nature of the proceedings. While the New York Port Authority and other New York governmental and commercial interests were undoubtedly active participants in the case, the primary issue is whether equalization is necessary to enable the plaintiff railroads to complete. And the evidence showed that the share of traffic handled by these railroads has been declining.

The last reason given in support of its decision is that with respect to the ports of Boston, Albany and Portland, "equalization would not materially affect the flow of traffic to these ports." Not only does this statement completely contradict the Commission's ultimate conclusion of undue prejudice to the southern tier ports, but it ignores the plaintiffs' right to attempt to gain some of this traffic for their lines.

We, therefore, conclude that the Commission's decision is erroneous in law and lacks the rational basis necessary

to uphold it and it must be set aside. A judgment may be entered setting aside the order of the I.C.C. and issuing a permanent injunction as prayed for.

s/ PETER WOODBURY,
Chief Judge,
United States Court of Appeals.

s/ GEORGE C. SWEENEY,
Chief Judge,
United States District Court.

s/ FRANCIS J. W. FORD,
United States District Judge.

APPENDIX B

United States District Court
District of Massachusetts

Civil Action No. 61-38-S

Boston and Maine Railroad and The New York, New Haven and Hartford Railroad Company,
Plaintiffs,

v.

United States of America and Interstate Commerce Commission,
Defendants.

Before WOODBURY, Chief Judge, United States Court of Appeals, SWEENEY, Chief Judge, United States District Court, and FORD, United States District Judge.

JUDGMENT

In accordance with the opinion of the Court handed down on February 16, 1962, it is hereby ORDERED

The order of the Interstate Commerce Commission of December 5, 1960, insofar as it directs the cancellation of schedules proposing differential-eliminating rates to and from the Ports of Portland, Maine, Boston, Massachusetts, Albany and New York, New York, denies fourth-section application No. 32204, and prevents differential-eliminating rates from becoming effective, is set aside and the operation, enforcement and execution thereof is permanently enjoined.

By the Court,

/s/ HELEN I. TWEEDY,
Deputy Clerk.

Approved:

/s/ PETER WOODBURY

/s/ GEORGE C. SWEENEY

/s/ FRANCIS J. W. FORD

Judgment entered February 23, 1962.

JOHN A. CANAVAN,
Clerk.

By /s/ HELEN I. TWEEDY,
Deputy Clerk.

APPENDIX C

The National Transportation Policy (Preamble to 49 U.S.C. 1) and the Interstate Commerce Act, 24 Stat. 379, as amended (49 U.S.C. 1 *et seq.*), provide as follows:

NATIONAL TRANSPORTATION POLICY

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; — all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

* * * * * *

"Sec. 1 * * * (5) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

* * * * * *

"Sec. 3 (1) It shall be unlawful for any common carrier subject to the provisions of this chapter to

make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

* * * * * *

"Sec. 4(1). It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter or chapter 12 of this title, but this shall not be construed as authorizing any common carrier within the terms of this chapter or chapter 12 of this title to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge

to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further*, That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this chapter or chapter 12 of this title and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further*, That tariffs proposing rates subject to the provision of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice."

* * * * * * *

"Sec. 15 (1) Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual

or joint rate, fare, or charge, or rates, fares or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

* * * * * *

"SEC. 15 * * * (7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice

goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

* * * * * * *

"Sec. 15a. * * * (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical and efficient management to provide such service."